No. 86

IN THE

Supreme Court of the United States

October Term, 1964

LOUIS ZEMEL,

Appellant,

v.

DEAN RUSK, Secretary of State, and ROBERT F. KENNEDY, Attorney General.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLANT

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Opinions Below

The opinions below (R. 32-67) are reported at 228 F. Supp. 65.

Jurisdiction

The judgment below (R. 67-68) was dated and entered on March 2, 1964. Appellant filed a notice of appeal in the court below on March 16, 1964 (R. 68-69).

The District Court had jurisdiction under 28 U. S. C. 1391, 2201, 2282 and 2284, and under Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009. Jurisdiction of this appeal is conferred on the Court by 28 U. S. C. 1253.

Following the Government's motion to dismiss or to affirm the judgment below, which appellant opposed, the Court entered an order postponing the question of jurisdiction to the hearing of the case on the merits (R. 70).

Questions Presented

1. Whether this was a proper case for a statutory court.

2. Whether the Secretary of State is authorized by 22 U. S. C. 211a, or by 8 U. S. C. 1185, to prohibit, upon pain of criminal prosecution, the travel of American citizens to and from Cuba.

3. Whether the Secretary has inherent non-statutory authority to exercise such power.

4. Whether the statutes, as construed and applied to appellant, are constitutional.

5. Whether an action will lie against the Attorney General and the Secretary of State to restrain their enforcement of the statutes.

Statutes, Proclamations, Executive Orders and Regulations Involved

The principal statutes involved are those considered by the Court in *Kent* v. *Dulles*, 357 U. S. 116, the Act of July 3, 1926, c. 772, § 1, 44 Stat. Part 2, 887, 22 U. S. C. 211a, and § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. 1185. These statutes and the pertinent portions of 5 U. S. C. 156 and 22 U. S. C. 1732, Presidental Proclamations No. 2914 of December 16, 1950 and No. 3004 of January 17, 1953, Executive Order No. 7856 of March 31, 1938, and the regulations of the Secretary of State relating to travel are printed in the Appendix, *infra*, pp. 58-59.

Statement of the Case

In this action appellant seeks a judgment (1) declaring illegal the Secretary of State's refusal to endorse his passport for travel to Cuba, (2) enjoining the Government's interference with such travel by threat of criminal proceedings and otherwise, and (3) enjoining as unconstitutional the enforcement of the statutes upon which the Secretary relies.

I. The Statutes and Regulations

The Government's actions whose validity is challenged by appellant are taken pursuant to passport statutes, proclamations and executive orders of the President, and regulations of the Secretary of State.

These statutes and regulations provide as follows: 22 U. S. C. 211a authorizes the Secretary of State to "grant and issue passports" [1] to citizens and other persons who owe allegiance to the United States.[2] Under the implementing Executive Order No. 7856,[3] the Secretary was authorized in his discretion to refuse to issue passports and to restrict them against use in certain countries. In *Kent* v. *Dulles, supra,* the Court refused to uphold this discretion to refuse a passport.

Section 215 of the Immigration and Nationality Act of 1952 (herein referred to as 8 U. S. C. 1185, App. *infra,* pp. 58-61), authorizes the President, in time of war or national emergency proclaimed by him, to invoke statutory restrictions making it unlawful, "except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, * * * for any citizen of the United States to depart from

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[1] 44 Stat. 887; App., *infra,* p. 58.

[2] 22 U. S. C. 212, 32 Stat. 386.

[3] 3 F. R. 799, 805, 22 C. F. R. 51.74, App., *infra,* p. 62.

or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

A state of emergency was declared on December 16, 1950 through Presidential Proclamation No. 2914 by reason of the Korean War.[4] Thereafter, on January 17, 1953, Presidential Proclamation No. 3004 [5] made the "departure and entry of citizens and nationals of the United States from and into the United States * * * subject to the regulations prescribed by the Secretary of State" in 22 CFR 53.1-53.9. These regulations required passports for all such entry to or departure from the United States except in the case of travel in the Western Hemisphere. The proclamation also authorized the Secretary "to revoke, modify or amend such regulations as he may find the interests of the United States to require".

Eight years later, on January 16, 1961, the Secretary of State issued Public Notice No. 179,[6] making passports "invalid" for travel to Cuba, Press Release No. 24 to the same effect,[7] and Departmental Regulation 108.456 [8] amending his regulations so as to require a valid passport for entry to and departure from the United States where Cuban travel was involved.

2. The Proceedings Below

Appellant is a citizen of the United States holding a valid American passport (R. 2). On March 31, 1962 he requested the Secretary to endorse that passport for travel to Cuba (R. 3). This request was rejected and the Secretary stated that the appellant was not entitled to travel to Cuba (R. 3).

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[4] 64 Stat. A454, App., *infra*, pp. 62-63.

[5] 67 Stat. C31, App., *infra*, pp. 63-66.

[6] 26 F. R. 492, App., *infra*, p. 68.

[7] App., *infra*, p. 69.

[8] 26 F. R. 482.

Earlier, the Secretary had threatened the institution of criminal proceedings against United States citizens traveling to Cuba without such passport endorsement, and the Attorney General had instituted at least one such criminal prosecution against an American citizen (R. 3, 8). The appellant also claims that common carriers have refused to carry American citizens not possessing such validated passports, and that foreign governments have refused to permit the departure of American citizens from their territories for Cuba under similar circumstances (R. 3).

Appellant accordingly instituted this action for declaratory judgment and injunction and recited the foregoing facts in his complaint. He also alleged that the Secretary's actions were not authorized by the two principal statutes involved, 22 U. S. C. 211a and 8 U. S. C. 1185, and that they were unconstitutional if they did give such authority (R. 3-5).

The Secretary answered, essentially admitting the factual allegations of the complaint (R. 10). The answer however denied "that the sources of his authority to place restrictions on travel by United States citizens to Cuba are limited to the particular statutes, proclamation, and executive order enumerated by the plaintiff, and further alleges that he also derives his authority aforesaid from the inherent power of the executive over foreign affairs" (R. 8). The answer also denied the existence of sanctions against common carriers and the Government's influence upon foreign governments (R. 8). Affirmative defenses alleged that the appellant "is not eligible to have his passport validated for travel to Cuba, a country with which the United States does not maintain diplomatic relations" (R. 9), that the "action of the defendant complained of is necessary to the conduct of foreign relations" (*ibid.*) and that "[w]ithin the reasonable and proper exercise of foreign relations, the Executive may properly prevent travel by United States citizens to certain designated

geographical areas of the world when necessitated by foreign policy considerations" (*ibid.*).

Upon appellant's request (R. 11) a statutory court was designated by the Chief Judge of the Court of Appeals for the Second Circuit (R. 14) and the statutory court, after hearing the Government's challenge to its jurisdiction under 22 U. S. C. 2282 and the parties' respective motions for summary judgment (R. 12, 15) determined that it did have such jurisdiction, denied appellant's motion for summary judgment, granted that of the Secretary of State, and dismissed the action against the Attorney General (R. 67-68).

3. Opinions in the District Court

A majority in the District Court (Circuit Judge Smith and District Judge Clarie) agreed that this was a proper case for a statutory court. A different majority (District Judges Clarie and Blumenfeld), upheld the constitutionality of the statutes. All three judges agreed that the action against the Attorney General should be dismissed.

(a) The opinion of the court below was written by District Judge Clarie (R. 32-46). He upheld appellant's right to a three-judge court because "this plaintiff, seeks affirmatively to enjoin the operation of a passport regulatory system" (R. 36) and because "[a] substantial constitutional question is in issue. The fact that the statutes' validity and their attendant regulations are in this instance being upheld, rather than nullified, does not alter the principle" (R. 36-37).

On the merits, Judge Clarie held that Congress had authorized the Secretary through both statutes to prohibit travel to Cuba and that the statutes were valid (R. 37). In his view, Congress had given the President passport power "within broad bounds of Executive discretion" (R. 43), and the absence of standards was excused by the need for "considerable discretion" in foreign affairs (R. 45). This apparently was the result of his view that "[t]his area of

government requires a joint-control effort of the Congress and the Executive, if the intended results are to be obtained" (R. 39). Judge Clarie did not indicate the reasons for his belief that the ban on travel to Cuba was justified, unless this was the intendment of his references to the provisions of 22 U. S. C. 1732, directing the Executive to protect the rights of American citizens on foreign soil (R. 49) and to the need "to prevent incidents occurring in those countries, where normal diplomatic relations are nonexistent" (R. 39). This Court's decision in *Kent* was distinguished on the ground that *Kent* involved the denial of passports because of "beliefs or associations" (R. 43).

The injunction against the Attorney General was denied by Judge Clarie because in his view the statutes were valid and "[t]here are no grounds upon which this Court would be justified in interfering with the criminal enforcement aspects of this statute" (R. 46).

(b) United States Circuit Judge J. Joseph Smith agreed that the court had jurisdiction (R. 52) but supported appellant's argument on the merits. He stated:

> "If § 211(a) of the Passport Act of 1926, 22 U. S. C. § 211(a) (1958), the sole statute cited in the regulations as a statutory basis, is construed at face value as a delegation of discretionary power to the Executive to impose restrictions on the issuance of passports to American citizens, it poses a problem of invalid delegation, for there are no standards in the statutory language, legislative history, or administrative practice." (R. 52)

However, Judge Smith added:

> "* * * I am unable to find in either § 211(a) of the Passport Act of 1926 or in § 215 of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1185 (1958), any basis for the area restrictions in the regulations proclaimed by the State Department. Neither act was designed to meet the present problem." (*Ibid.*).

He pointed out that § 211a was merely intended to centralize passport issuance in the federal government and that "the language of § 215 [8 U. S. C. 1185] says nothing about empowering the Secretary of State to restrict travel to certain foreign areas" (R. 54). Relying upon this Court's decision in *Kent* v. *Dulles, supra,* he insisted that a narrow construction was required "to preserve individual rights and to avoid constitutional doubts" (*ibid.*), and he described the majority's construction of 8 U. S. C. 1185 as "a truly remarkable feat of judicial gymnastics." (*Ibid.*)

Judge Smith also pointed out that "[e]ven if one adopts the view of the four dissenters in *Kent* v. *Dulles* . . . there is no finding that travel to Cuba by Zemel or those similarly situated would endanger the internal security of the United States" (R. 54). He noted that the majority had not adopted the view of the Court of Appeals for the District of Columbia "which found the power of the Secretary of State to impose area restrictions inherent in the Executive's plenary power over foreign affairs" (R. 55), and pointed out that "*Kent* v. *Dulles* implicitly rejected the notion that the Executive had inherent constitutional power to curtail individual freedom to travel abroad" (*Ibid.*).

Regarding the majority's reliance upon 22 U. S. C. 1732 (relating to the protection of American citizens) as rather "dubious" proof "that passport control is so intertwined with foreign affairs," he said that "the entire approach flies in the teeth of the language of *Kent* v. *Dulles*" (R. 55). Pointing out that none of the bills seeking to give the Secretary power over area travel had become law, he emphasized that "such legislation is necessary, for the regulations cannot be supported by the existing statutes, inherent executive power, or by any executive agreement" (R. 56). His conclusion was that "Congress should take the responsibility for authorizing them after a full fact-finding inquiry" (*Ibid.*).

(c) District Judge Blumenfeld alone urged that this was a case for a single district judge. Conceding that the constitutional question was substantial, he regarded the lawsuit as directed principally against the regulations (R. 59). In particular, he viewed 8 U.S.C. 1185 as irrelevant since "the defendant expressly disclaims reliance upon it here as a source of authority for the regulation excluding travel to Cuba" (R. 59).

On the merits, Judge Blumenfeld upheld the Secretary on the ground that the regulations were supported by 22 U. S. C. 211a (R. 63) and he denied that the Court had limited the Secretary's right to deny passports to the two instances specified in *Kent* (R. 64). While agreeing that "the criteria for measuring the Secretary's discretion have not been determined other than it may not be 'unbridled'" (R. 64), he considered that negative criterion sufficient because "the fact that Congress gave it to the Executive indicates that it is to be exercised in relation to his powers to conduct foreign affairs" (R. 64). He disposed of appellant's claim of an unconstitutional delegation of power with the remark that the standard was sufficient if it merely required "a reasonable connection to the conduct of foreign affairs" (R. 65); this connection was sufficient, in his view, because "the United States has broken off diplomatic relations" with Cuba (R. 65). He rejected the test of "gravest imminent danger to the public safety" suggested in *Kent*, said that the Secretary's prohibition of travel to Cuba "relates not to internal security but to foreign affairs" (R. 66), and held that "the right to travel is properly subject to a reasonable prohibition" (*Ibid.*).

Summary of Argument

I.

A. The statutory court had jurisdiction under 28 U. S. C. 2282. All the necessary elements for the convening of the court were present: (1) the complaint alleged a basis for equitable relief; (2) the constitutional question raised was substantial, and (3) the appellant sought to enjoin the enforcement of two federal statutes, 22 U. S. C. 211a and 8 U. S. C. 1185, as unconstitutional. The appellees met the constitutional issue by asserting that both statutes (as well as an inherent executive power) authorized the Secretary's regulations, and that the statutes were constitutional. The court below upheld the Secretary's reliance upon the challenged statutes.

B. The three-judge court was not deprived of jurisdiction because appellant also denied that the statutes authorized the Secretary's regulatory action. A suitor is not required to surrender all arguments other than the constitutional attack upon a statute in order to have a statutory court. Where, in addition, he claims that the statute does not authorize the regulations or that the latter are otherwise invalid, the Court has entertained and determined appeals from three-judge courts. *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535; *Rusk* v. *Cort*, 372 U. S. 44.

C. Sound public policy supports the jurisdiction of a statutory court in the present case. Congress created the statutory courts because it was concerned about the danger of permitting a single judge to enjoin the operation of a statutory scheme. Thus, in a close case it is preferable that a plaintiff seek a statutory court. However, there is no possible doubt here as to the propriety of a three-judge court in view of the issues as framed by the parties and resolved by the decision of the court below.

II.

The Secretary's regulations are not authorized by the Passport Act of 1926, 22 U. S. C. 211a, or by § 215 of the Immigration and Nationality Act of 1952, 8 U. S. C. 1185. Neither statute, either in its language, legislative history or purpose, authorizes the Secretary's regulations.

A. 22 U. S. C. 211a has already been interpreted by the Court in *Kent* v. *Dulles, supra,* as merely centralizing passport power in the Secretary of State. It does not, in terms, authorize the Secretary to prohibit travel to particular areas. When Congress has intended to prohibit travel to particular areas, it has easily found the necessary language. Section 211a could not have been intended to authorize area restrictions, for at the time of its passage in 1926 and that of its progenitor statutes in 1856 (11 Stat. 52, 60-61), and in 1902 (32 Stat. 386), a passport was not a requirement for lawful departure, entry or travel.

In *Kent,* the Court construed this very statute narrowly because of the constitutional problems which are raised by a curtailment of basic liberties. Here, as there, to import such additional power into the general language of Section 211a would be to raise constitutional questions of vagueness and of delegation of legislative authority.

There can be no claim of a substantial administrative practice prior to and embodied by Congress in the Passport Act of 1926. The subsequent pattern of governmental action supports appellant's construction of the statute: (1) passport restrictions were of a wartime character; (2) restrictive passport language was never claimed to carry criminal or other sanctions; (3) the State Department explicitly indicated the contrary in construing the passport "restrictions" of May 1952 (*infra,* p. 27); (4) despite frequent disregard of such restrictions during three decades, there were no criminal prosecutions until 1963; (5) the Department showed considerable doubt before congressional

committees in its claims of statutory power; (6) immediately following the decision in *Kent*, the Administration unsuccessfully sought legislation giving it the right to impose area restrictions; and (7) this was followed for six years by similar attempts to obtain legislation, all unsuccessful.

B. 8 U. S. C. 1185 is not cited as a source of authority in the Public Notice or in the amendment to the regulations, as Judge Blumenfeld points out below (R. 67-68). The statutory language shows it to be a border-control statute rather than a restriction upon areas of travel. The legislative history is devoid of reference to area restrictions. The statute was originally concerned with the entry and departure of aliens, clearly a matter unrelated to area restrictions. Nor have area restrictions ever been based upon 8 U. S. C. 1185 or upon its predecessor statutes of 1918 and 1941. This statute, too, was the subject of the Court's narrow construction in *Kent* v. *Dulles, supra*, by reason of the constitutional problems involved.

Even if 8 U. S. C. 1185 were more than a border-control statute, it could not support the Secretary's regulations. First, it is a national defense statute under the war power directed against espionage and related criminal activities. No war or national emergency relevant to Cuban travel exists presently and this Court could appropriately recognize that fact. Second, the ban upon Cuban travel was not claimed to be nor was it an exercise of the war power.

III.

A. The court below did not adopt the Secretary's claim of an inherent right to control travel under the foreign affairs power (R. 8). Instead, it held that the Secretary had acted pursuant to statutory power, although the majority disagreed in part as to the authorizing statutes.

The claim of inherent executive power—on grounds of foreign affairs or otherwise—has been disposed of by the

Court's decision in *Kent* v. *Dulles, supra*. There the Court held, first, that passport control over travel could not be subsumed under the foreign affairs power, and second, that travel restriction required, as a minimum, the exercise of the law-making functions of the Congress.

This lack of executive power over the movement of citizens has been repeatedly admitted by responsible officials of the Government. It has been demonstrated by the vigorous efforts, all unsuccessful, of the Executive and members of Congress to obtain legislation authorizing the Secretary to impose geographic restrictions.

B. If such an inherent executive power existed, its importance, in terms both of source of foreign relations power and of its impact upon individual liberty, would require that it be exercised by the President himself. But the President has not imposed any prohibition upon travel to Cuba; it was the State Department through an Under Secretary of State for Administration which purported to determine that the national interest required the ban upon the travel of American citizens to Cuba.

The provision of Executive Order 7856 authorizing the Secretary to restrict passports was not intended to give the Secretary the right to determine to what countries an American citizen might travel. At the time of promulgation, such restrictions did not prevent lawful departure from the United States or travel to other countries since passports were not then required by the laws of the United States. In any event, the claims of discretionary power conferred by that executive order upon the Secretary were rejected by the Court in the *Kent* case.

Nor does 5 U. S. C. 156 support the President's delegation of power to the Secretary. That statute merely gives administrative authority, and "decisions of great constitutional import" (*Greene* v. *McElroy*, 360 U. S. 474, 507) must be authorized by "explicit action" (*ibid.*).

IV

The Secretary's prohibition of travel to Cuba is a violation of appellant's constitutional right to travel under the First, Fifth and Ninth Amendments. The prohibition interferes with the citizen's right to be well informed on public issues. It also conflicts with the basic principles of liberty of movement set forth in the Universal Declaration of Human Rights adopted by the United Nations. The right to travel is an important liberty so "basic to our scheme of values", *Kent* v. *Dulles, supra,* at 127, that only urgent necessity can justify its restriction. In the absence of war or similar situation "of comparable magnitude", *Kent* v. *Dulles, ibid.*, it cannot be said that there was an urgent necessity for the travel ban. The Korean War emergency declared in 1950 was not the claimed basis for the restriction and, in fact, could not constitutionally justify it. The Court has the power to determine whether that emergency declaration is in effect today and whether it bears any possible relationship with the ban on travel to Cuba.

The restriction was incidental to the breach of diplomatic relations resulting from the reduction of the American Embassy staff in Havana. That breach did not make this country unable to protect American citizens visiting Cuba, and, indeed, there is no indication of any special need for such protection or of the inability of the Swiss Embassy in Havana to represent American interests. Maintenance of diplomatic relations with another country has never been a condition precedent to the lawful travel of American citizens.

There is reason to believe that the ban upon travel to Cuba was intended to put that country into a form of Coventry and to act as an example to Latin American countries. Neither objective can constitutionally justify the interference with the travel of American citizens.

V

The court below was in error in dismissing the complaint against the Attorney General. The complaint alleged that he was interfering with the travel of American citizens to Cuba and that he had instituted criminal prosecutions based upon such travel. The traditional requirements for a declaratory judgment action were present. The suit was not premature in light of the allegations of present interference and of the criminal prosecutions then and thereafter instituted by the Attorney General.

ARGUMENT

Introduction

This case involves the same basic issue which was before this Court in two recent cases, *Kent* v. *Dulles,* 357 U. S. 116, and *Aptheker* v. *The Secretary of State,* 378 U. S. 500, the constitutional protection of liberty of movement. In *Kent* and *Aptheker,* it was the right to depart from the United States; here it is the right to travel to a country which the State Department declares to be out of bounds.

This case also involves the same two statutes and executive orders with which this Court dealt in the *Kent* case. If anything, the Government's position in *Kent* found greater support in statutes, executive orders and the administrative practice of the Secretary than it does here. This case requires the same concern which the Court showed in *Kent* and *Aptheker* for liberty of movement, and the application of the same principles of statutory construction.

I

This was a proper case for a statutory court.

We address ourselves preliminarily to the matter of the Court's jurisdiction in view of its order of October 12, 1964 postponing that question to the hearing of the case on the merits (R. 70).

A. The amended complaint challenged the Secretary's passport restrictions upon appellant's travel and the appellees' threats of criminal prosecution, on two independent grounds: (1) that they were unauthorized by statute, and (2) that the Passport Act of 1926, 22 U. S. C. 211a and the Immigration and Nationality Act of 1952 § 215, 8 U. S. C. 1185, relied upon by appellees

> "are unconstitutional both on their face and as applied because (a) on their face, they interfere with plaintiff's rights as set forth in paragraph 14(c); and (b) they are construed and applied to prevent travel even in the absence of an actual emergency; and (c) they contain no standards and are therefore an invalid delegation of legislative power." (R. 4)

Appellant therefore sought judgment decreeing, *inter alia*, "that the Passport Act of 1926, *supra*, and Section 215 of the Immigration Act of 1952, *supra*, are unconstitutional, and enjoining the defendants from carrying out or enforcing the said statutes, as aforesaid" (R. 5).

Appellees answered that both statutes (as well as an inherent executive power) authorized the Secretary's regulations, violation of which was punishable under 8 U. S. C. 1185. They denied that the two statutes were unconstitutional (R. 8).

B. The court below unanimously agreed that the constitutional question was a substantial one (R. 36, 52, 58). This was a necessary consequence of this Court's decisions in *Kent* v. *Dulles*, *supra*, and *Aptheker* v. *The Secretary*

of State, supra, that travel was an important liberty protected by the Constitution.

Two members of the court, District Judges Clarie and Blumenfeld, held that the restrictions upon appellant's travel were authorized by Congress (R. 37, 63). Judge Clarie relied upon both statutes, Judge Blumenfeld only upon Section 211a (*ibid.*). Circuit Judge Smith, who dissented on the merits, agreed, however, that a three-judge court had jurisdiction "for the case sufficiently calls into question the constitutionality of the statutes relied upon by the Executive to sustain the regulations embodying area restrictions on the issuance of passports" (R. 52).

The majority below correctly held that a three-judge court was necessary since "the constitutional question raised is substantial * * * the complaint at least formally alleges a basis for equitable relief, and * * * the case presented otherwise comes within the requirements of the three-judge statute" (R. 35-37), *Idlewild Liquor Corp.* v. *Epstein,* 370 U. S. 713, 715. In view of the injunctive relief sought, it cannot be said here as in *Flemming* v. *Nestor,* 363 U. S. 603, 607, that the action "did not seek affirmatively to interdict the operation of a statutory scheme".[9] A judgment for appellant would necessarily "put the operation of a federal statute under the restraint of an equity decree" (*ibid.*).

C. Judge Blumenfeld was in error in regarding this as "a case for a district court of one judge" (R. 57) on the ground that the "focal point of the plaintiff's attack is clearly upon the regulation itself" (R. 59). Appellant's assertion that the regulations were not authorized by Congress was consistent with his challenge to the constitutionality of the statutes relied upon by the Government (R. 5-6).

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[9] The distinction between *Rusk* v. *Cort,* 372 U. S. 144 (three-judge court) and *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, is that in the latter case "the issues were framed so as not to contemplate any injunctive relief" (*id.* at 153).

A suitor who challenges the validity of a statute relied upon by the Government to authorize regulatory action properly sues under 28 U. S. C. 2282, even where, alternatively, he argues that the statute does not authorize the regulations or that the latter are not valid. This is what occurred in *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 541, 553, where a three-judge court heard a complaint that certain regulations "are not authorized by statute or that, if purporting to be so authorized, the statute violates the Federal Constitution." [10] See also *Rusk* v. *Cort*, 372 U .S. 144, *Bauer* v. *Acheson*, 106 F. Supp. 445 (D. C. D. C., 1952). See also *Lee* v. *Bickell*, 292 U. S. 415, 417, 425; *Florida Lime Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 77, 80-81, 85; *Sterling* v. *Constantin*, 287 U. S. 378, 393, 394.

In *Phillips* v. *United States*, 312 U. S. 246, 252, cited by Judge Blumenfeld, the plaintiff sought "a restraint not of a statute but of an executive action". Similarly, *William Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, 173, is inapposite since it held that "no substantial question of constitutional validity was raised" with respect to the statute there involved (*id.* at 173). That cannot be said of the instant lawsuit in the light of this Court's recent decisions on freedom of movement, *infra*, pp. 20-21. It is this critical factor that distinguishes the *William Jameson* case from the instant one.

Judge Blumenfeld was also in error in relying upon the fact that the petitioners in *Kent* v. *Dulles*, *supra*, had not sought a three-judge court even though the same two statutes were involved (R. 60). The difference between the two cases is that in *Kent* the petitioners did not seek to enjoin the operation of the two statutes, whereas that is the objective of appellant's complaint. Indeed, this distinc-

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[10] The complaint in *Rusk* v. *Cort*, *supra* (par. 19, p. 4, Transcript of Record, October Term 1960, No. 567), alleged, *inter alia*, the absence of evidence against plaintiff and that the statute whose constitutionality was under attack was inapplicable to him.

tion was anticipated by the Solicitor General in his brief in *Kent*.[11]

D. One final consideration supports the jurisdiction of a statutory court. It is the public policy, as enunciated by the several acts of Congress relating to statutory courts, that an attack upon the enforcement of a statute as unconstitutional must be brought before a statutory court in view of the danger of permitting a single judge to stay a statutory scheme. In a close question, it is therefore preferable that a plaintiff seek a statuory court. That such close questions frequently arise in this somewhat amorphous area is manifested by such recent cases as *Schneider* v. *Rusk*, 377 U. S. 163, and *Florida Lime Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 77, 80-81, 85. The reluctance of lower courts in the last two instances to designate statutory courts was not only in conflict with the basic policy of Congress, but injured the parties litigant by extended delays in adjudication.

In noting these policy considerations, we do not suggest that the instant case is a close one. The issues as framed by the parties and the views of the judges below on the merits clearly involve the constitutionality of two federal statutes whose enforcement was unsuccessfully sought to be restrained. This leaves no possible doubt as to the necessity for a three-judge court and the consequent jurisdiction of this Court upon the present appeal.

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[11] The Solicitor General said, in response to the constitutional attack of the petitioners in *Kent* v. *Dulles* upon 8 U. S. C. 1185, "An initial jurisdictional problem is raised by the fact that petitioners, while attacking the Secretary's regulations as unauthorized by the statutes and unlawful under the First and Fifth Amendments, did not challenge the constitutionality of the statutes themselves in their complaints (R. 2-4, 100-103). Accordingly, the constitutionality of 8 U. S. C. 1185 should not be open to attack by them here. It should be noted that, had petitioners challenged the constitutionality of the statute in the District Court, a problem as to convening a three-judge district court would have arisen. See 28 U. S. C. 2282; *cf. Bauer* v. *Acheson*, 106 F. Supp. 445 (D. D. C., three-judge district court)." (Respondent's Brief in *Kent* v. *Dulles*, Oct. Term 1957, No. 481, pp. 91-92, n. 98.)

II

There is no statutory authority for the Secretary's regulations.

We address ourselves first, in accordance with the traditional policy of this Court—prior to a review of the constitutional issues—to the question of whether the statutes relied upon by the Secretary authorize the ban upon travel to Cuba and the ancillary sanctions, including criminal penalties.

A. Appellant has a constitutional right to travel which can be regulated, if at all, only by an explicit statute with appropriate standards.

We necessarily begin this statutory construction with this Court's determination that there is a constitutional right to travel which this Court has upheld twice in recent Terms against both executive and legislative interference.

In *Kent* v. *Dulles,* 357 U. S. 116, 125, the Court said: "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." It said: "If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress. *Youngstown Sheet & Tube Co.* v. *Sawyer* (343 U. S. 579)." *Id.* at 129. Emphasizing the necessity for legislative action, it said: "We are first concerned with the extent, if any, to which Congress has authorized its curtailment" (357 U. S. 116, 127). And it said, citing *Korematsu* v. *United States,* 323 U. S. 214, 218, that this right to travel was subject to restriction only where, upon a showing of " 'the gravest imminent danger to the public safety' * * * the Congress and the Chief Executive moved in coordinated action" (357 U. S. 116, 128). The Court added:

> " * * * the right of exit is a personal right included within the word 'liberty' as used in the Fifth

> Amendment. If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress. *Youngstown Sheet and Tube Co.* v. *Sawyer, supra.* And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. See *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 420-430. *Cf. Cantwell* v. *Connecticut,* 310 U. S. 296, 307; *Niemotko* v. *Maryland,* 340 U. S. 268, 271. Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. See *Ex parte Endo,* 323 U. S. 283, 301-302. *Cf. Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, 156; *United States* v. *Rumely,* 345 U. S. 41, 46. We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen." (*Id.* at 129)

In *Aptheker* v. *The Secretary of State,* 378 U. S. 500, the Court reiterated the principle established in *Kent.* It held that an Act of Congress, Section 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U. S. C. 785, was unconstitutional because it abridged the right to travel guaranteed by the Fifth Amendment.

B. Neither of the two statutes to which the complaint is addressed authorizes the Secretary's prohibition upon travel to Cuba.

1. The Passport Act of 1926

Section 1 of the Passport Act of 1926, 22 U. S. C. 211a, is cited in Public Notice 179, 26 F. R. 492, as the sole statutory authority for the declaration that travel to Cuba is "inimical to the national interest." The same statute is cited as the sole authority for Departmental Regulation 108.456, 26 F. R. 482, amending 22 CFR 53.3, so as to require passports for entry to and departure from the United States where travel to Cuba was involved.

The language of Section 211a does not authorize area restrictions any more than it authorizes the denial of passports for political reasons. See *Kent* v. *Dulles, supra,* at page 130. When Congress intended to prohibit travel to certain areas, it used unmistakable language for that purpose. Thus *e.g.* the Act of February 4, 1815 directed that no citizen or resident "be permitted to cross the frontier into the enemy's country or territory in his possession without a passport", 3 Stat. 199.[12]

22 U. S. C. 211a merely authorizes the Secretary to issue passports. Its purpose, as described by the Court, was to deprive "various federal officials, state and local officials and notaries public" of the power to issue passports and to centralize that power in the Secretary of State. (*Kent* v. *Dulles,* 357 U. S. at 123.)[13]

There is nothing in the legislative history of Section 211a or its predecessor statutes to indicate an intention to authorize area restrictions. This section is derived from the Act of August 18, 1856, 11 Stat. 52, 60-61, a general *Act to Regulate the Diplomatic and Consular Systems of the United States,* which, to the extent relevant, was merely intended to prevent persons other than the Secretary of State from issuing passports.[14] Area restrictions could not have been contemplated since at the time of its original passage in 1856 a passport was not needed for travel, and

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[12] Another example of an area limitation imposed by Congress appears in the Act of June 30, 1834, 4 Stat. 729.

[13] See also 9 Op. Atty. Gen. 350 (1859), Dep't of State, *The American Passport* (1898) 36-42.

[14] The provision under discussion appears in essentially the same form in the Revised Statutes (1874) Section 4075; the Act of June 14, 1902, 32 Stat. 386; and the Act of July 3, 1926, 44 Stat., Part 2, p. 887. See H. Rep. 1358, 69th Cong., 1st Sess., and S. Rep. 1177, 69th Cong., 1st Sess. on H. R. 12495 which became the Act of 1926.

the same was true upon each of the occasions of its reenactment.[15]

In *Kent* v. *Dulles, supra,* this Court held that familiar principles of statutory construction with respect to statutes impairing constitutional rights forbade the expansion of 22 U. S. C. 211a to include the denial of passports for political reasons—this despite a long history of executive claims to absolute discretion and despite the frequent denial of passports to individuals for personal and political reasons.[16]

Precisely the same principles prohibit the expansion of the same statute to include area restrictions. Here again, exercise of "the law-making functions of the Congress" (*Kent* v. *Dulles, supra,* at 129) is required before area restrictions can be upheld. And these functions must be exercised in such a manner as to give the Executive the guiding benefit of clear Congressional standards (*ibid.*). To suggest, as did Judge Clarie below, that there must be "considerable discretion and elbow room" in "dealing with foreign affairs" (R. 45), is to disregard the fact that the statute has no standards at all. It also assumes incorrectly that restrictions upon a citizen's travel may be subsumed under the heading of foreign affairs. See *infra,* pp. 39-45.

Further, a construction of Section 211a which would import into it the power to impose area restrictions would make the statute unconstitutional because its "limits are

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[15] On none of these occasions, 1856, 1902 and 1926, was a passport required for lawful departure from and entry into the United States since the border control statutes, *infra,* pp. 31-39, were not in effect on those dates. See *Kent* v. *Dulles,* 357 U. S. 116, 123-124. A passport was an advantage for citizens because it gave "authentic proof of their national character," Dep't of State, *op. cit., supra,* at 169. It was not until the First World War that other countries began the practice of requiring passports for the entry of foreigners. See *Kent* v. *Dulles,* 357 U. S. 116, 121, 123.

[16] See Executive Order 7856, March 31, 1938, 3 F. R. 799, App. *infra,* p. 62, and the dissenting opinion in *Kent* v. *Dulles,* 357 U. S. 116, 131-132.

so vague and undefined" (Circuit Judge Smith, R. 57). The use of a term that is so vague and indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Company*, 269 U. S. 385, 391; see also *Small* v. *American Sugar Refining Company*, 267 U. S. 233, 238-240. The vagueness of the regulations is especially pernicious where, as here, First Amendment rights are involved. *Cramp* v. *Bd. of Public Instruction*, 368 U. S. 278; *Burstyn* v. *Wilson*, 343 U. S. 495; *Winters* v. *New York*, 333 U. S. 507; *Niemotko* v. *Maryland*, 340 U. S. 268; *Kunz* v. *New York*, 340 U. S. 290.

In addition, 22 U. S. C. 211a, as construed and applied by the Secretary and by the Attorney General in his criminal prosecutions under 8 U. S. C. 1185, has become a penal statute. This, under the decisions of the Court, is an additional reason for requiring a narrow construction. *Commissioner of Internal Revenue* v. *Acker*, 361 U. S. 87, 91; *Smith* v. *United States*, 360 U. S. 1, 9; *F. C. C.* v. *American Broadcasting Co.*, 347 U. S. 284, 296.[17]

The Court has told us that "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred", *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.

In *Kent* this principle was applied to the broad claims of executive discretion made by the Secretary and, indeed, supported by the unambiguous language of Executive Order

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[17] It may be that for the same reasons which Judge Bazelon urged in his dissenting opinion in *Briehl* v. *Dulles*, 248 F. 2d 561, 579, revs'd *sub nom. Kent* v. *Dulles*, 357 U. S. 116, the Secretary's construction of Section 211a and his regulations conflict with the Congressional policy as set forth in the Expatriation Act of 1868, 15 Stat. 223-224, R. S. § 1999, favoring freedom of expatriation. See *Savorgnan* v. *United States*, 338 U. S. 491, 498-9.

7856. What the Court said there is equally applicable here:

> "The difficulty is that while the power of the Secretary of State over the issuance of passports is expressed in broad terms, it was apparently long exercised quite narrowly. So far as material here, the cases of refusal of passports generally fell into two categories. First, questions pertinent to the citizenship of the applicant and his allegiance to the United States had to be resolved by the Secretary, for the command of Congress was that 'No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.' 32 Stat. 386, 22 U. S. C. § 212. Second, was the question whether the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States. See 3 Moore, Digest of International Law (1906), § 512; 3 Hackworth, Digest of International Law (1942), § 268; 2 Hyde, International Law (2d rev. ed.), § 401.
>
> The grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. Yet, so far as relevant here, those two are the only ones which it could fairly be argued were adopted by Congress in light of prior administrative practice. One can find in the records of the State Department rulings of subordinates covering a wider range of activities than the two indicated. But as respects Communists these are scattered rulings and not consistently of one pattern. We can say with assurance that whatever may have been the practice after 1926, at the time the Act of July 3, 1926, was adopted, the administrative practice, so far as relevant here, had jelled only around the two categories mentioned. We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." 357 U. S. at 127-128.

There is even less reason here than in *Kent* to find a jelling of an enforceable administrative prohibition of travel to particular areas. In making this observation, we do not suggest that in the absence of clear statutory language authorizing area restrictions, a runaway exercise of executive "discretion" would be permitted to override the intent of Congress.

There is nothing in the Secretary's behavior prior to the Act of 1926 which Congress may be said to have adopted in its passage of 22 U. S. C. 211a. Each of the few instances of restricted passports occurred in wartime, and in none is there any indication that the restriction represented a prohibition upon travel or, more to the point, a prohibition whose violation would have criminal consequences.[18]

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[18] In another pending case involving the right to travel to Cuba, the Secretary has given *four* instances of such restrictions in the entire history of the country prior to the Act of 1926 in the following language:

> "During the Civil War Secretary Seward prohibited the travel to Europe by citizens going 'on errands hostile and injurious to the peace of the country and dangerous to the Union'. (3 Moore, [International Law Digest (1906)], 920.)
>
> During World War I, early in 1915, the Department of State passed a restriction on the issuance of passports for Belgium because of famine conditions there. (3 Hackworth, [Digest of International Law (1942)], 526.)
>
> In 1919 the Department of State prohibited unnecessary travel from the United States to Europe before peace had been declared, and further because of existing shortage of food and overtaxing of transportation and other facilities on the continent. (*Id.*, at 529-530.)
>
> During the same year the Secretary did not authorize issuance or endorsement of passports for Germany. No objection, however, was interposed to the entry into Germany of Americans who had important and urgent business to transact there. (*Id.*, at 530.)" (Brief of the Government in *MacEwan* v. *Rusk*, C. A. 3d, No. 14920, p. 25, n. 18.)

These very few instances, all distinguishable from the instant case, are also reviewed in *Freedom to Travel*, Report of the Special Commmittee to Study Passport Procedures of the Association of the Bar of the City of New York (1958), pp. 14-18, 50-58.

The Secretary's actions subsequent to the passage of the Act of 1926 cannot, of course, authorize a rewriting of the statute. However, in the various restrictions imposed by the Secretary after 1926, there was again no claim that travel was prohibited and certainly no attempted criminal prosecution, although numerous persons, including a United States Senator, travelled to countries outside the scope of their passport coverage.[19]

Indeed, on May 1, 1952 the Department of State issued a press release in which it announced:

> "This passport is not valid for travel to [specified countries] unless specifically endorsed under authority of the Department of State as being valid for such travel."[20]

At the same time, the Department stated that this was *not* a travel prohibition:

> "In making this announcement, the Department emphasized that this procedure in no way forbids American travel to those areas. It contemplates that American citizens will consult the Department or the consulates abroad to ascertain the dangers of traveling in countries where acceptable standards of protection do not prevail and that, if no objection is perceived, the travel may be authorized."

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[19] See, *e.g., Report of the Commission on Government Security Pursuant to Public Law 304,* 84th Cong. (1957), p. 472; *Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies,* 85th Cong., 1st Sess. (1957) (herein called Senate Hearings, 1957), pp. 23-24, 26, 30-31, 55, 71; *Hearings before the Senate Committee on Foreign Relations on Passport Legislation,* S. 2770, S. 3998, S. 4110, and S. 4137, 85th Cong. 2d Sess. (1958) (herein called Senate Hearings, 1958), pp. 38, 163, 196.

[20] Press release No. 341 quoted in *Hearings before the Sub-Committee on Constitutional Rights of the Senate Committee on the Judiciary,* 84th Cong., 2d Sess., at 40-41, and noted in Senate Hearings, 1957, *op. cit.* p. 40.

The Association of the Bar of the City of New York in discussing this press release [21] states:

> "This appears to have been an honest admission of the lack of statutory power to enforce an area restriction of this nature." *Freedom to Travel—Report of the Special Committee to Study Passport Procedures* (1958), p. 70.
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> "The Committee has not discovered any statute which clearly provides a penalty for violation of area restrictions, and this seems to be a glaring omission if the United States is seriously interested in the establishment and enforcement of travel controls. Knowing violation of valid restrictions should certainly be subject to an effective sanction, which is not now the case." *Ibid.*

There is other evidence of the absence of such authority. The various restrictions imposed by the Secretary do not appear to have been predicated upon a claim of authority under Section 211a. The Department has been significantly unwilling to answer the inquiries of Congressional committees as to its power to prohibit travel to particular areas.[22] In our entire history as a nation, there was not a single prosecution of an American citizen for violation of area restrictions until 1963 when four students were indicted for conspiracy to violate 8 U. S. C. 1185 by inducing

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[21] The Department's efforts to reinterpret this release have not been very persuasive. See Senate Hearings, 1957, *op. cit.*, pp. 40-41, 78; Senate Hearings, 1958, *op. cit.*, pp. 12-13. Sometimes the Department has expressed the view that "geographic abuses" would result in the denial of future passports, Senate Hearings, 1958, *op. cit.*, p. 26. Elsewhere its representatives have expressed some doubt as to whether a violation of the regulations is a violation of the Passport Laws. See, *e.g.*, Senate Hearings, 1957, *op. cit.*, pp. 31, 59.

[22] See the Senate Hearings, 1957, *op. cit.*, at pp. 14-15, 40-41, and particularly the Committee's view that the Department was "not responsive," *id.* at 78, a view repeated by Senator J. W. Fulbright, Senate Hearings, 1958, *op. cit.*, pp. 12-13.

travel to Cuba, *United States* v. *Laub, et al.* (E. D. N. Y., Cr. Nos. 63-425 and 64-137).[23]

The lack of executive power has been repeatedly demonstrated by the vigorous efforts made in the executive and legislative branches of the government to secure legislation giving the Secretary the power to impose geographic restrictions upon travel. In 1957, the *Report of the Commission on Government Security* expressly recommended the amendment of 8 U. S. C. 1185 "to make it unlawful for any citizen of the United States to travel to any country in which his passport is declared to be invalid" (S. Doc. 64, 85th Cong. (1957) 475). Then, following the *Kent* decision, the President asked Congress for "clear statutory authority to prevent Americans from using passports for travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives * * *" (H. Doc. No. 417, 85th Cong., 2d Sess.). This was not a routine request. It was made formally and explicitly because of the Court's decision in the *Kent* case. The President's request was embodied in a bill which was followed by numerous similar bills in the last six years.[24] It is very significant that Congress consistently failed to adopt

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[23] This was followed by a second indictment of nine persons for a similar conspiracy, *United States* v. *Laub, et al.* (E. D. N. Y., Cr. No. 64-350). William Worthy, the American newspaperman who was prosecuted for returning to the United States from Cuba without any passport, *Worthy* v. *United States*, 338 F. 2d 386 (C. A. 5, 1964), had never been prosecuted for his prior travel to China; see *Worthy* v. *Herter*, 270 F. 2d 905, *cert. den.* 361 U. S. 918. The only other prosecution, also a recent one, is based upon travel to Cuba without any passport, *United States* v. *Travis* (S. D. Calif., No. 32380-C.D., appeal pending, C. A. 9th).

[24] See, *e.g.*, 85th Cong., 1st Sess.: S. 2770, H.R. 8655; 85th Cong., 2d Sess.: S. 3344, 4030, 4110, H.R. 13005, 13318; 86th Cong., 1st Sess.: S. 1303, 2095, 2287, H.R. 2468, 5455, 7315, 8329, 8930, 9069; 87th Cong., 1st Sess.: H.R. 388, 935, 1086, 2485; 88th Cong., 1st Sess.: H.R. 2559, 8652.

these proposals. Similar recommendations were made by the House Committee on Un-American Activities (see, *e.g.*, H. Rep. No. 53, 85th Cong., 1st Sess., p. 56 (1957)) to no avail. As Mr. Justice Frankfurter has said, "* * * [t]his practical construction of the Act by those entrusted with its administration is reenforced by the [Administration's] unsuccessful attempt to secure from Congress an express grant of authority * * *", *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 352.

2. The Immigration and Nationality Act of 1952

We turn next to Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. 1185 (1952). This statute in its language, purpose, legislative history and implementation likewise has nothing whatever to do with area restrictions. It is a border-control statute; the conditions necessary for its invocation have not occurred; and to construe it to authorize area restrictions would raise serious constitutional problems.

The statute provides that in time of war or national emergency proclaimed by the President, he may make it "unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter the United States unless he bears a valid passport" (App. *infra*, pp. 59-60). It also contains restrictions upon the entry and departure of aliens.

We treat of this statute *in extenso* because it was relied upon by the government in its answer (R. 8) and by Judge Clarie in his memorandum of decision (R. 37). However, the statute is not cited as authority for the area restrictions imposed by Public Notice 179, 26 F. R. 492 (App. *infra*, p. 68) or by Departmental Regulation 108.456, 26 F. R. 482, amending 22 CFR 53.3(b) (App. *infra*, pp. 66-67). Indeed, Judge Blumenfeld viewed the area restrictions under attack as "promulgated under § 211(a)" (R. 62) and stated that "the defendant expressly

disclaims reliance upon [8 U. S. C. 1185] here as a source of authority for the regulation excluding travel to Cuba" (R. 59).

The legislative history of this statute and of its two predecessors, the Act of May 22, 1918, 40 Stat. 559, and the Act of June 21, 1941, 55 Stat. 252, indicates that it was a war measure intended to seal off the borders of the United States by requiring passports of American citizens for entry to and departure from the United States, and by requiring permission for aliens similarly desiring to cross the borders of the United States.

(a) *The original border control statute, the Act of May 22, 1918.*

The Act of 1918 was a war measure directed at such crimes as espionage by restricting the entry to and departure from the United States of aliens and citizens.[25] The House Foreign Affairs Committee, which added the section relating to the travel of citizens,[26] explained the bill as follows (H. Rep. 485, 65th Cong., 2d Sess., pp. 2-3):

> "The bill is intended to stop an important gap in the war legislation of the United States. * * * American citizens and neutrals [are] perfectly free to come and go. No argument is necessary to indicate the probability that Germany will wherever possible employ renegade Americans or neutrals as her agents

[25] It was suggested by President Woodrow Wilson in his Address to Congress on December 4, 1917, where he emphasized the necessity of creating "a very definite and particular control over the entrance and departure of all persons into and from the United States." As the Committee on Foreign Affairs of the House of Representatives pointed out: "The Attorney General in his report for 1917 made a similar recommendation. The Department of Justice proceeded to draft the bill now under discussion, which was referred to and received the approval of all the other executive departments interested in the matters to which it relates. It was introduced in Congress on February 26, 1918." (H. Rep. 485, 65th Cong., 2d Sess., p. 2.)

[26] See 56 Cong. Rec. 6029.

instead of employing Germans about whom suspicion would easily be excited. The danger of the transference of important military information causes the Government great anxiety, particularly as the Attorney General has formally ruled that neither the President nor the executive department have power to curb the general departure and entry of travelers.

New legislation is the only remedy. * * *

* * * It will be observed that citizens need not secure such permits as are required of aliens, but must bear valid passports. Passports will continue to be issued as at present by the Department of State, and there is no reason to believe that any American citizen will be unduly inconvenienced by these restrictions. That some supervision of travel by American citizens is essential appeared from statements made before the committee at the hearing upon the bill. One case was mentioned of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was strong suspicion that he came to the United States for no proper purpose. Nevertheless not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so. The known facts in his case are not sufficient to warrant the institution of a criminal prosecution, and in any event the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined. * * *

It is essential to meet the situation that the Executive should have wide discretion and wide authority of action. No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent. It is obviously impracticable to appeal to Congress for further legislation in each new emergency. Swift Executive action is the only effective counterstroke.

The committee was informed by representatives of the executive departments that the need for prompt legislation of the character suggested is most pressing. There have recently been numerous suspicious

departures for Cuba which it was impossible to prevent. Other individual cases of entry and departure at various points have excited the greatest anxiety. This is particularly true in respect of the Mexican border, passage across which can not legally be restricted for many types of persons reasonably suspected of aiding Germany's purposes.

* * * Your committee were also of the opinion that the bill is, and therefore reported it as, an emergency war measure."

The bill was limited to war and required a Presidential finding concerning "the public safety" to justify the prohibition of entry into and departure from the United States without permission (56 Cong. Rec. 6029).[27] Mr. Flood, its principal spokesman, emphasized the fact that it was a war measure intended "to control ingress and egress from this country" (56 Cong. Rec. 6029). A principal purpose, in his view, was to prevent "traitors [from getting] the chance to come back and spy on our military operations" (56 Cong. Rec. 6064). The record is replete with references to "suspects", "traitors" and "suspected spies" (56 Cong. Rec. 6031, 6064, 6067). When it was suggested that they could be criminally prosecuted if permitted to enter, he responded that because there were difficulties of proof "these are people who ought to be now out of the country and kept out until the war ends" (56 Cong. Rec. 6066). Mr. Flood added that all nations at war "have found it necessary to control travel to and from their countries" and that "Germany has * * * closed its borders entirely" (56 Cong. Rec. 6067).[28]

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[27] "Mr. Moore of Pennsylvania: The gentleman advances this as a war measure and puts it on that ground?

Mr. Flood: Absolutely. It is limited to the duration of the war." (56 Cong. Rec. 6030.)

[28] There were numerous references to border control and no references whatever to the imposition of area restrictions. It was understood that passports would not be required for the crossing of the Canadian-American border because of the inconvenience of a passport system to American citizens working in Canada. See *e.g.* 56 Cong. Rec. 6192.

In the Senate, its Judiciary Committee also pointed out that the "danger of transference of important military information causes the Government great anxiety, particularly as the Attorney General has formally ruled that neither the President nor the executive departments have power to curb the general departure and entry of travelers" (S. Rep. No. 431, 65th Cong., 2d Sess., p. 2).[29] Mr. Shields, spokesman for the bill, described it as "a supplement to the espionage acts" (56 Cong. Rec. 6191) and said: "The object of it is to control the entry and departure of all persons in or from their territory. It is a war measure and in line with the legislation that has been enacted by all the nations engaged in the war" (56 Cong. Rec. 6191). The debate in the Senate emphasized that the bill "authorizes prevention of departure and entry" and that it was a "war measure" (see 56 Cong. Rec. 6191, 6192, 6194, 6248).

The executive implementation of the Act of 1918 shows no imposition of area restrictions.[30] While the controls as to aliens were continued (40 Stat. 559) since the statute was effective only in war time, the controls terminated on March 3, 1921 (H. Res. No. 64, 41 Stat. 1359, *et seq.*).

(b) *The Amendment of June 21, 1941*

In 1941, during World War II, after President Franklin D. Roosevelt had proclaimed an unlimited national emergency,[31] Congress amended the 1918 statute to provide,

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[29] The Committee said with respect to a particular citizen that "not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so." (*Ibid.*, p. 3.)

[30] See Executive Order No. 2932, *For. Rel.*, 1918, Supp. 2, 815, for the implementing regulations. The history of those regulations and their operation during World War I, is set forth in 2 Hyde, International Law Chiefly As Interpreted and Applied By the United States (1945), pp. 1202-1206. See also, the *Hearings on The Extension of Passport Control. Hearings before the Committee on Foregin Affairs of the House of Representatives,* 69th Cong., 1st Sess. (1919).

[31] Proclamation No. 2487, May 27, 1941, 55 Stat. 1647.

inter alia, that the Act could be invoked during the then existing emergency.[32] The legislative history of that statute showed that its purpose was the same as that of its predecessor (S. Rep. 444, 77th Cong., pp. 1-2). The pertinent Senate Report stated:

> "During the last war, when it is believed a lesser number of persons were engaged in espionage and subversive activities in the United States than is now the case, notwithstanding the fact that the United States is not at war, it was found desirable to enact legislation to provide for the regulation of travel to and from the United States on the part of all persons, citizens as well as aliens. The situation existing throughout the world and the necessity of promoting as far as possible the national defense justify, it is believed, the enactment of legislation providing for the centralization of control over the entry into and departure from the United States of persons of all classes. * * * Since the Act of May 22, 1918, was the subject of considerable litigation and consequently has been construed in a number of respects by the courts of the United States, it seems particularly desirable that the act be amended rather than that new legislation be enacted. * * * " (S. Rep. 444, 77th Cong. p. 2)

Again the debates were unequivocal concerning the purpose of the bill and the intended manner of its operation. In the House, Congressman Bloom made reference to "a law that prevents aliens and citizens from departing or entering this country during the time this country is at war" (87 Cong. Rec. 5048). Mr. Dickstein said that "this bill distinctly speaks of a person entering and going." (*Ibid.*). Mr. Luther A. Johnson added:

> " * * * The sole purpose of this legislation is to give that same power that this Government had during the World War, and have a sort of clearing house where people entering or leaving this country would have to give their reasons why they were going or

[32] Act of June 21, 1941, 55 Stat. 252.

> coming, and where it would be determined whether they are engaged in espionage, and whether their coming in or going out would be inimical to the interests of the United States. * * * [They] would have to go to the State Department and state why they were coming in or going out and secure an entrance or exit permit." (87 Cong. Rec. 5052)[33]

The debate in the Senate was along the same lines (87 Cong. Rec. 5325-5326, 5387-5389).[34] The significant new element in the Senate debate was Senator Taft's insistence "that the bill should be confined to the present emergency" (87 Cong. Rec. 5386) because it affected a basic liberty. He said that "when in effect we delegate legislative powers to the President, such powers should be confined to the particular emergency for which we are asked to delegate them; and when the emergency is over they should terminate." *Ibid.* Senator La Follette supported Senator Taft's amendment

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[33] See the letter of Mrs. Ruth B. Shipley, Director of the Passport Division of the State Department, which discussed the need for legislation "providing for the centralization of control over the entry into and departure from the United States of persons of all classes" (87 Cong. Rec. 5048). The following remarks are typical and relevant:

> "Mr. Bloom. * * * This would prevent a person, like Fritz Kuhn, or anybody else, from leaving the country if we wanted to keep him here." (87 Cong. Rec. 5049).

Mr. Johnson described the evidence before the House Committee in this way:

> "It was stated that there were a number of incidents occurring in the enforcement of espionage laws which revealed the necessity for this law so they could effectively keep check on parties under suspicion and whose activities stamped them as enemies of our Government" (87 Cong. Rec. 5052; see also 87 Cong. Rec. 5047-5053, 5416).

[34] Senator Van Nuys, the principal proponent of the bill, pointed out that "the main objective is to reach certain elements of aliens" (87 Cong. Rec. 5325). He stated that "there is more espionage and subversive activities in the United States today than at any previous time in our history" (87 Cong. Rec. 5386). Senator Taft referred to "travel over the borders of the United States." (*Ibid.*)

(87 Cong. Rec. 5387) and the bill was eventually limited, so far as citizens are concerned, to "the existence of the national emergency proclaimed by the President on May 27, 1941"; it was agreed to in that form by the House (87 Cong. Rec. 5416). The Taft Amendment is relevant to any consideration of the wartime purpose of this series of statutes. It also has a bearing upon the constitutional problem (*infra*, pp. 45-55).

The 1941 statute was invoked by the President less than a month before Pearl Harbor.[35] It was implemented by regulations of the Secretary of State requiring passports for entry and departure and not imposing area restrictions.[36] Congress continued the statutory provisions in effect until April 1, 1953.[37]

c) *The present statute*

In 1952 Congress repealed the 1918 statute as amended, the act of June 21, 1941, 55 Stat. 252, amending it only so as to make the provisions subject to invocation during "any national emergency proclaimed by the President * * *" (66 Stat. 190). It is obvious that the basic purpose of the 1952 statute is the same as that of its two predecessors in view of the absence of additional legislative history and the statement in the House report that the statutory provisions "are incorporated in the bill [Sec. 215] in practically the same form as they now appear in the Act of May 22, 1918 (40 Stat. 559)" (H. Rep. 1365, 82d Cong., 2d Sess., p. 53). See also *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 541. In other words, the statute is a wartime measure imposing

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[35] Proclamation No. 2523, November 14, 1941, 55 Stat. 1696.

[36] Departmental Order 1003, 6 F. R. 6069. These regulations were amended by Departmental Regulation 11, August 27, 1945, 10 F. R. 11046, and now appear in 22 CFR Part 53.

[37] 66 Stat. 54, 57, 96, 137, 330, 333.

controls over the departure and entry of aliens and citizens because of the danger of their committing criminal acts affecting the national defense.[38]

The administrative implementation of this statute of 1952 likewise supports the narrow construction required by the Court in the *Kent* case for constitutional reasons. On January 17, 1953, the President promulgated Proclamation 3004, 67 Stat. C31, significantly entitled, "Control of Persons Leaving or Entering the United States by the President of the United States of America" (App. *infra*, pp. 63-66). The Proclamation stated that "the exigencies of the international situation and of the national defense still require" that the statutory restrictions upon departure and entry be continued "in the interests of the United States" (App. *infra*, p. 64). The regulations of the Secretary relating to departure and entry which had been issued in 1941 were expressly incorporated, as amended, in the Proclamation (App. *infra*, pp. 64-66). Neither the Proclamation nor the regulations do more than impose restrictions upon the departure from or entry into the United States.

If more were necessary to limit the statute to its original intendment, it may be found in a number of other sources. Thus, in its brief in *Kent*, in discussing the right to restrict passports against use in certain parts of the world,

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[38] As the Solicitor General correctly points out in his brief in *Kent* v. *Dulles*, *supra*, pp. 55-56:

> "In short, the intended control of departure and entry [56] was to be carried out by the denial of permits to individual aliens, and by the denial of passports to individual citizens, where the departure or entry of such persons was deemed 'contrary to the public safety' in the context of the war or emergency which required the invocation of the restrictions."

"[56] The 1918 statute (40 Stat. 559) was entitled 'An Act to prevent in time of war *departure from or entry into* the United States *contrary to the public safety*'" (emphasis added).

the Government correctly pointed out: "But this restriction would carry no sanctions, since the statute now makes it unlawful only 'to depart from or enter' the country *without a lawful passport.*" [39] And in none of its many appearances before Congressional committees has the Department of State relied upon this statute as substantive authority for area restrictions.[40]

We have already referred to its press release of 1952 (*supra*, p. 27) in which the Department indicated that it was not claiming the right to prohibit travel to so-called "restricted" areas (*supra, ibid.*), and to the view of distinguished commentators with respect to this admission (*supra*, p. 28). It is also significant that many of the bills which sought to give the power to impose area restrictions to the Secretary of State were in the form of proposed amendments to 8 U. S. C. 1185. As we have seen, such an amendment was never adopted by the Congress.

The conclusion is inescapable that 8 U. S. C. 1185 means precisely what it says. It is a form of border control and it does not authorize the Secretary to impose area restrictions.

POINT III

The President does not possess, nor has he exercised, an inherent executive power to prevent the travel of American citizens to a particular country.

A. The Court below did not uphold the claim of inherent Executive power.

While the Secretary had asserted in his answer an inherent executive right to control travel under the foreign affairs power (R. 8), the Court below held that the Secre-

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[39] Brief for respondent, *Kent & Briehl* v. *Dulles*, Oct. Term, 1957, No. 481, p. 56, n. 57 (italics the Government's).

[40] See, *e.g.*, the Senate Hearings, 1957, and 1958, *op. cit., passim.*

tary's ban upon travel to Cuba was authorized, not by an inherent executive power, but by statute. Thus, in the principal opinion, District Judge Clarie stated:

> "The issue in this case is whether or not geographical restrictions imposed by the Secretary of State in respect to travel to Cuba are authorized by Congressional act and if so are these statutes which purport to grant such authority repugnant to constitutional limitations." (R. 37; see also R. 39)

Circuit Judge Smith, dissenting, agreed that the majority of the Court did not "adopt the approach of the District of Columbia Court of Appeals in *Worthy* v. *Herter*, 270 F. 2d 905 (1959), *cert. denied*, 361 U. S. 918 (1959), which found the power of the Secretary of State to impose area restrictions inherent in the Executive's plenary power over foreign affairs" (R. 55). "*Kent* v. *Dulles*," Judge Smith added, "implicitly rejected the notion that the Executive had inherent constitutional power to curtail individual freedom to travel abroad" (R. 55).

Judge Blumenthal held that the Secretary's authority was predicated upon a single statute, 22 U. S. C. 211a (R. 63), and he added that "the defendant expressly disclaims reliance upon [8 U. S. C. 1185] here as a source of authority for the regulation excluding travel to Cuba" (R. 59).

Nevertheless, we address ourselves briefly to the point, since it was the *raison d'etre* of the decision of the District of Columbia Court of Appeals in the *Worthy* case [41] and

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[41] *Worthy* v. *Herter*, 270 F. 2d 905, *certiorai denied*, 361 U. S. 918. The special distinguishing factors in the situation relating to China which undoubtedly affected the Court of Appeals have been set forth by the Department in the Senate Hearings, 1957, *op. cit.*, pp. 4-5, 21-22, 25, 27, 68-69.

the partial basis for a district court opinion in another Cuban travel case.[42]

B. There is no such inherent power.

In *Kent* v. *Dulles, supra,* the Court held that the right to travel is a liberty "of which a citizen cannot be deprived without due process of law" (357 U. S. at 125). Such due process includes as a minimum the exercise of "the law-making functions of the Congress" (*id.* at 129).

The Court's decision stands for the proposition that there is no inherent executive power to control the travel of an American citizen. Indeed, the Court went farther in *Kent* when it indicated the strict conditions under which such law-making power might be exercised through delegated powers (*ibid.*). And in the subsequent case of *Aptheker* v. *The Secretary of State*, 378 U. S. 500, even the exercise of power by the Congress was stricken as an unconstitutional interference with the constitutional liberty of travel.

The unequivocal statement of the Court in *Kent* followed a similar ruling of the Attorney General many years ago (see H. Rep. 485, 65th Cong., 2nd Sess., p. 2) and an even earlier statement by President Jefferson that the Executive power does not include "the prerogative powers * * * of retaining within the State, or recalling to it any citizen thereof * * * except so far as he may be authorized from time to time by the legislature to exercise any of those powers." Jefferson's Writings, Ford's Ed., 1894, Vol. III, p. 155.[43]

It has been asserted elsewhere that restrictions upon the travel of American citizens raise political questions justifying the exercise of an inherent executive power over

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[42] *MacEwan* v. *Rusk,* — F. Supp. — (E. D. Pa.) now pending on appeal, C. A. 3, No. 14920.

[43] For an example of the necessity for legislative action, see *Blackmer* v. *United States,* 284 U. S. 421.

foreign affairs.[44] On the contrary, in *Kent* the Court made it clear that passports were outside the scope of "political questions" because despite "some implication of intention to extend the bearer diplomatic protection" (357 U. S. at 129), the passport's "crucial function today is control over exit" and "the right to exit is a personal right included within the word 'liberty' as used in the Fifth Amendment" (*ibid.*). It was in that connection that the Court said, "if that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress" (*ibid.*).

The President's great powers to wage war and conduct foreign relations do not authorize him to dispose in his discretion of the private rights of citizens under the foreign affairs power. He cannot authorize a general confiscation of enemy property. *Mitchell* v. *Harmony*, 13 How. (54 U. S.) 115. See also *Brown* v. *United States*, 8 Cranch (12 U. S.) 110. It is Congress, not the President, which can declare embargoes. See Wright, *The Control of American Foreign Relations* (1922), 301-303.

In *Briehl* v. *Dulles*, 101 U. S. App. D. C. 239, 278, 248 F. 2d 561, 588 *et seq.*, reversed *sub nom. Kent* v. *Dulles, supra*, Judge (now Chief Judge) Bazelon in a dissenting opinion joined in by Chief Judge Edgerton analyzed the Government's foreign relations claims and pointed out that "those cases all relate in some direct fashion to the Executive's traditional power to do things which depend upon negotiations with foreign sovereignties or which bear directly upon our relations with foreign governments" (at p. 589). Each of the instances cited by Judge Bazelon is distinguishable from restrictions upon a citizen's liberty of travel.

The lack of executive power is admitted by the language of the Department's Press Release No. 341 of May 1, 1952

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[44] *Worthy* v. *Herter, supra*, n. 41.

to which we have previously referred, *supra*, p. 27. It has been demonstrated by the vigorous efforts made in the executive and legislative branches of the government to secure legislation giving the Secretary the power to impose geographic restrictions upon travel, *supra*, pp. 29-30. The significance of the attempt and of its failure has already been discussed in our consideration of the statutory problem, *supra*, p. 29, and is equally persuasive on the issue of inherent power. See *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 352.

C. The President did not exercise any inherent power over travel in the instant case.

The President has neither asserted the power to impose area restrictions nor has he exercised it with respect to travel in Cuba. The President's last relevant action appears in Proclamation 3004, January 17, 1953, 67 Stat. C31, directing that passports be required for departure and entry to countries other than those in the Western Hemisphere. The proclamation says nothing whatsoever about area restrictions; it does not require even a passport for travel to Cuba. It was the Department of State which, in January, 1961, established this requirement of a passport for travel to Cuba.

The authority in Proclamation 3004 to the Secretary "to revoke, modify or amend such regulations as he may find the interest of the United States to require" is a reference to 22 CFR Part 53. That part of the regulations describes the instances in which a passport is required for entry and departure, but it does not ban travel to a particular area.

It is true that Executive Order 7856 authorizes the Secretary in his discretion "to restrict the passport for use only in certain countries." But it was the same Executive order which authorized the Secretary in his discretion to refuse to issue a passport (App., *infra*, p. 62)

which was held insufficient in *Kent* to give such authority to the Secretary.[45]

The claim of delegation is rendered even weaker in the instant case, since it was not the Secretary, but a Deputy Under Secretary of State, who imposed the ban on travel to Cuba (App., *infra*, p. 68). 5 U. S. C. 156 (App., *infra*, p. 61), is equally inapposite to the present case. That statute gives administrative authority to the Secretary; it does not authorize him to make determinations of policy affecting the basic rights of American citizens.[46] As this Court said in *Greene* v. *McElroy*, 360 U. S. 474, 496:

> "* * * the question which must be decided in this case is not whether the President has inherent power to act or whether Congress has granted him

[45] The history of such discretion to refuse a passport is, of course, much more extensive than the practice of limiting it to particular areas. See, *e.g.*, Executive Order No. 2119-A, January 12, 1915 (reprinted in For. Rel., 1915, Supp., 902); Executive Order No. 2286-A, December 17, 1915 (reprinted in For. Rel., 1915, Supp., 912); Executive Order No. 2362-A, April 17, 1961 (reprinted in For. Rel., 1916, Supp., 787); Executive Order No. 2519-A, January 24, 1917 (reprinted in For. Rel., 1917, Supp., 1, 573); Executive Order No. 4382-A, February 12, 1926 (reprinted in *Hearings Before the House Committee on Foreign Affairs on H. R. 11947* (1926), 69th Cong., 1st Sess., pp. 19-25); Executive Order No. 4800, January 31, 1928; Executive Order No. 5860, June 22, 1932; Executive Order No. 7856, March 31, 1938, 3 F. R. 799, 22 CFR 51.75.

[46] Judge Bazelon's discussion in his dissenting opinion in the *Briehl* case of the Government's claim of delegation under Executive Order 7856 is apposite here. *Briehl* v. *Dulles*, 248 U. S. 561, reversed *sub nom. Kent* v. *Dulles*, 357 U. S. 116. His reference there to the Secretary's authority to determine when a passport is required was not, of course, an expression of view that the Secretary could ban travel to particular areas; that issue was not litigated. The kind of administrative authority intended to be given to the Secretary, *i.e.* "administrative rules" is indicated in the testimony of Assistant Secretary of State Carr on the bill which became the Act of 1926. Hearings before the House Committee on Foreign Affairs, H. R. 11497, 69th Cong., 1st Sess. (1926), pp. 5-6.

such a power; rather, it is whether either the President or Congress exercised such a power * * * "

The authority of administrators to make "decisions of great constitutional import" (*Greene* v. *McElroy, supra,* at 507) must be demonstrated by "explicit action" (*ibid.*). The instant case presents the impermissible combination of a serious impairment of constitutional liberty by an adminstrator whose authority cannot possibly be described as "explicit".

D. Conclusion.

The claim of inherent Executive power is untenable because it is inconsistent with this Court's view in *Kent* v. *Dulles, supra;* it has traditionally been disavowed by the Executive branch; and it is inconsistent with the efforts to secure empowering legislation. The restrictions themselves make no claim of inherent authority but explicitly rely upon claimed statutory authority, and the restrictions were not made by the President but by an official in the Department of State.

IV

The Secretary's actions violate appellant's constitutional liberty of movement.

A. The Secretary's actions are admittedly an interference with "freedom to travel" which this Court has described as "an important aspect of the citizen's 'liberty.'" *Kent* v. *Dulles,* 357 U. S. 116, 127. They interfere not only with the physical mobility of the individual but with a right which this Court has described as "deeply ingrained in our history" (357 U. S. at 126), "as close to the heart of the individual as the joys of what he eats, or wears or reads" (357 at 127) and "basic in our scheme of values" (*ibid.*). The opinion in Kent emphasized the "large social

values" of such travel (*ibid.*) and quoted from Professor Chafee's statement that:

> "Finally, travel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed on public issues. An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home." [*Three Human Rights in the Constitution*, 162, at 195-196]. (357 U. S. at 126-127).

These were some of the considerations which led this Court in *Kent* to indicate that only in rare circumstances could even Congress interfere with this liberty of movement. The Court significantly described the regulations under the 1918 and 1941 statutes (*supra*, pp. 31-37) as "war measures" (357 U. S. at 128) and said: "We are not compelled to equate this present problem of statutory construction with problems that may arise under the war power" (*ibid.*).

The constitutional test of urgent necessity was suggested by this Court when it said:

> "In a case of comparable magnitude, *Korematsu* v. *United States*, 323 U. S. 214, 218, we allowed the Government in time of war to exclude citizens from their homes and restrict their freedom of movement only on a showing of 'the gravest imminent danger to the public safety.' There the Congress and the Chief Executive moved in coordinated action; and, as we said, the Nation was then at war. No such condition presently exists. No such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional

right of the citizen has been made here." (357 U. S. at 128) [47]

In *Kent* that test was held to require a statutory construction—under which the Secretary was not given the power to control travel. In *Aptheker* the importance of the constitutional guarantee led the Court to declare unconstitutional (for reasons not directly applicable here) even a clear congressional statute.

B. The United States was not at war in 1961 when the State Department imposed this ban upon travel to Cuba, nor is it at war with Cuba today. There is no more a "showing of extremity" here than there was in 1958 when *Kent* was decided. On the contrary, the "chamber of horrors" offered by the Secretary in *Kent* [48] to show the danger to national security of travel by Communists renders almost miniscule his arguments in this case. Indeed, we do not understand that the Secretary makes any claim that the restrictions here were under the war power, and that there was any danger to the public safety, much less one that is either grave or imminent (357 U. S. at 128).

The Public Notice restricting travel to Cuba refers only to "the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans

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[47] The Secretary's claim of "authority to be the final judge as to which American citizen can go to which countries abroad, and for what purposes" has been described by Senator Fulbright as "extraordinary power". Senate Hearings, 1958, *op. cit.*, p. 13. President Eisenhower approved such interference only "in terms of overriding requirements of our national security." Senate Hearings, 1958, p. 164. The Association of the Bar of the City of New York, which has recommended *legislative* authority for geographic restrictions believed them justified only in cases of "exceptional gravity." Senate Hearings, 1959, p. 105.

[48] See Brief for the Solicitor General in *Kent* v. *Dulles*, Oct. Term 1957, No. 481, pp. 60-64.

visiting Cuba." This is far from the national danger which would justify the interference with the constitutional right of an American to travel.

The breach in diplomatic relations occurred in January, 1961, in response to the Cuban Government's insistence on a reduction in the size of the staff of the American Embassy in Havana. 44 Dept. of State Bull. 103, 104. There was no indication then or thereafter of any inability on the part of so powerful a country as the United States "to extend normal protective services to Americans visiting Cuba", (App. *infra*, p. 69). Indeed, the very suggestion is belied by the succeeding statement in the same press release of January 16, 1961 that "exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or business men with previously established business interests" (*ibid.*). The breach has not resulted in any inability to protect American citizens since the Swiss Government, which now occupies the building of the American Embassy in Havana, is actively engaged in the representation of American interests.[49]

Nor can it be said that any unusual protection has been found necessary for American visitors to Havana, who have included newspaper, radio and television representatives, dramatists, architects, physicians and even chess players at international chess tournaments—all of whom came to, resided in and departed from Cuba in complete safety.[50]

As the Association of the Bar Committee has said, "it seems clear that the existence of diplomatic relations does not necessarily improve the ability of a country to protect

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[49] See 44 Dept. of State Bull. 103 (1961).

[50] The same point of the Government's responsibility for protection has been urged by the Government elsewhere. In the Court of Appeals Judge Bazelon pointed out in his dissenting opinion that there was no enforceable right to protection. *Briehl* v. *Dulles*, 248 F. 2d 561, rev'd *sub nom. Kent & Briehl* v. *Dulles*, 357 U. S. 116.

its citizens in another country." [51] Indeed, since 1961 there have been more arrests of American citizens in the Communist countries of Europe with which the United States has diplomatic relations than have occurred in Cuba.[52] Further, as the Association points out "the Department has not consistently invalidated passports for travel to countries with unrecognized regimes." [53]

C. The opinion below does not treat precisely with the constitutional issue under discussion here. There is a footnote reference to the Congressional resolution of October 3, 1962 (76 Stat. 697), which, of course, was subsequent to the travel ban and related to a different matter which was disposed of by means quite different than the interference with the travel of American citizens (R. 47).

There is reference to the Declaration of Costa Rica, in which the Foreign Ministers of some Central American Republics agreed to recommend to their governments "that they adopt, *within the limitations of their respective constitutional provisions*, measures to put into effect immediately, to prohibit, restrict and discourage the movement of their nationals to and from Cuba" (emphasis added) (R. 48). In the court below and in the *MacEwan* case, the Secretary argued that the State Department wishes to discourage travel between the South American countries and Cuba; that it is not concerned with danger to the United States, but possible danger to those Latin American countries; and that the United States cannot consistently urge these countries to ban travel to Cuba while permitting American citizens to go there.

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[51] *Freedom to Travel, op. cit., supra*, n. 18.

[52] The United States Government has not sought to impose area restrictions even where there have been unlawful arrests. Senate Hearings, 1957, *op. cit.*, p. 16.

[53] *Freedom to Travel, op. cit.*, p. 53; see also Senate Hearings, 1957, *op. cit.*, pp. 16, 26, 67, 112-113, 116-117. Of course, the Government of Cuba is still recognized by the United States, since severance of diplomatic relations is not a withdrawal of recognition. Lauterpacht, *Recognition in International Law*, 354-355 (1954).

In short, the Secretary proposes to curtail the rights of American citizens in order to furnish a good example to other countries in the hemisphere. It is submitted that this is to turn American citizens into instruments of foreign policy [54] and that it is a constitutionally impermissible reason for imposing restrictions upon liberty of movement.

The Secretary's actions represent a return to the vague standard of "the best interests of the United States" (App., *infra*, p. 69), which constituted his passport policy for a decade until it was declared unlawful by this Court in *Kent*.[55]

The travel ban is a direct interference with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies. *Comment*, 61 Yale L. J. 171, at 191. See *e.g.*, the remark of Senator Allen J. Ellender that the impressions he gained "on a trip abroad" differ sharply from those received from the State Department (New York Times, September 5, 1955, p. 4, col. 3).[56]

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[54] For criticisms of this concept of the American citizen as an instrument of foreign policy see Senate Hearings, 1957, *op. cit.*, pp. 87, 91, 104, and Senate Hearings, 1958, *op. cit.*, pp. 137, 142, *et seq.*

[55] See the discussion in *Freedom to Travel*, *passim*, *op. cit.*, and in Petitioner's Brief in *Kent* v. *Dulles*, Oct. Term 1957, No. 481, pp. 42, *et seq.*

[56] See also the statements on the subject in the Senate Hearings, 1957, by the then Senator Hubert M. Humphrey (pp. 27-29), by former Asst. Secretary of State Edward W. Barrett (p. 14) and by J. R. Wiggins, Executive Editor of the Washington Post (p. 101), and in the Senate Hearings, 1958, by Joseph N. Welch (p. 165) and by Henry Steele Commager (p. 167).

District Judge Wyzanski has brilliantly assimilated travel to the exchange of ideas and experiences protected by the First Amendment:

> "This travel does not differ from any other exercise of the manifold freedoms of expression, from the right to speak, to write, to use the mails, to publish, to assemble, to petition. In all these liberties the principal element is the stretching of the mind to accommodate the growing spirit." (Wyzanski, *Freedom to Travel,* Atlantic Monthly, Oct. 1952, 66, 68) [57]

Our experience with China has indicated the danger to the democratic process in closing off all means of communication and observation between the nationals of the two countries. It is a travesty that the principal articles and books on China which have appeared in this country were written not by Americans but by the nationals of other countries which permit them to travel to China.[58] We have improved the situation slightly by allowing journalists and businessmen to go to Cuba, but that does not meet the more important problem of allowing the citizen, except in time of actual war, to see for himself what is happening in other countries.[59]

There is in fact no national emergency with respect to Cuba or one which has any connection with the travel ban. Since only Judge Clarie below was of the opinion that 8 U. S. C. 1185 was a basis for the regulations, only he made reference to the Presidential Proclamations of December 16, 1950 and January 17, 1953 (R. 40). Those proclamations may or may not justify the requirement of a passport as a form of border surveillance or control. They

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[57] See also the recognition of the First Amendment's dependence upon freedom to travel in *Freedom to Travel, op. cit.*, pp. 35, *et seq.*

[58] See Senate Hearings, 1957, pp. 22, 29.

[59] See Editorial, Saturday Evening Post, Nov. 14, 1964, p. 86.

certainly are not the equivalent of a finding that there is an emergency requiring a prohibition of travel to Cuba.

The Court is not bound by a decade-old declaration of a national emergency which is inapplicable to the present situation and no longer exists. It has the authority to inquire whether there is in fact such a national emergency in existence today which can support this restriction upon civil liberty. In *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, Mr. Justice Holmes stated with respect to an emergency declaration by a legislature that

> "* * * [A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. * * * And still more obviously so far as this declaration looks to the future it can be no more than prophecy and is liable to be controlled by events. A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed * * *." (*Id.* at 547-548)

In that case, the Court held that, had the case revolved about the existence of the emergency at the time of its consideration by the Supreme Court, it would have taken judicial notice of the fact that there no longer existed in the District of Columbia a housing emergency sufficient to validate the Rent Control Act of 1919, as subsequently reenacted. It remanded the case to the trial court for a determination of the facts because the existence of the emergency at different times was deemed material.

In *East New York Savings Bank* v. *Hahn,* 326 U. S. 230, Mr. Justice Frankfurter, in upholding the constitutionality of the 1943 extension of New York State's Moratorium Law, distinguished *Chastleton* as dealing with "quite a different situation." (*Id.* at 235.) The difference lay in

the care and frequency with which the legislature had renewed the law from time to time, and adjusted its terms, based in each case on a full investigation of the facts:

> "The whole course of the New York moratorium legislation shows the empiric process of legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts * * *." (*Id.* at 234-235); see also *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, 433.

No such "reconsideration" by either Congress or the President has occurred in the instant situation.

In *Woods* v. *Miller,* 333 U. S. 138, 147, Mr. Justice Jackson's concurring opinion upholding federal rent control in 1948 denied, however, "that war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended."

The Court of Appeals for the Ninth Circuit, in a recent opinion upholding the judicial power to look behind a Presidential declaration of national emergency relating to possession of gold bullion, made an observation even more striking in its applicability to personal liberties:

> "It seems vital as a matter of national policy that emergency regulations and almost dictatorial powers granted or conceded in the turmoil of war, cold war, economic revolution and the struggle to preserve a balanced democratic way of life, should be discarded upon return to normal conditions, lest we grow used to them as the fittings of ordinary existence. Executive regulations drafted and confirmed for an emergency should expire with the emergency. There will be time enough to revivify these if another emergency require and Congress be willing. Of course, if it seems essential to continue the subject matter of these criminal regulations now,

Congress can so declare. But the power lies in Congress." *Bauer* v. *United States,* 244 F. 2d 794, 797 (C. A. 9, 1957).

Judge Blumenfeld, of course, did not rely upon these proclamations because, in his view, 8 U. S. C. 1185 was not applicable (R. 67). Indeed, he expressly disavowed the view that danger to the public safety was a criterion, and said that "the right to travel is probably subject to a reasonable prohibition on travel to a particular foreign country which our Government believes to be so unfriendly to this nation as to require the severance of diplomatic relations with it" (R. 66).

The premise underlying this statement is incorrect in view of the varied considerations that induce a breach of diplomatic relations. Judge Blumenfeld was also in error in stating that "the State Department predicts that such travel might provoke international situations which would necessitate negotiations (22 U. S. C. 1732 (1958)), with a government whose existence the United States is committed to ignore" (R. 66). There has been no such prediction by the State Department, negotiations betwen the two countries go on frequently through such intermediaries as the Czechoslovak and Swiss Ambassadors, and the United States recognizes the Government of Cuba rather than ignores its existence. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 406.[60]

The United States is the only democratic country which, to our knowledge, imposes area restrictions upon the travel of its citizens. Logically, there is no difference between this type of restraint upon travel outside the country and restrictions which South Africa has adopted upon liberty of movement within that country. We do not, of course, equate the actions of the two countries. But it is well to remind ourselves of the danger of the "best inter-

[60] See Lauterpacht, *op. cit.*

ests'' rule relied upon by the Secretary herein as he did in *Kent, supra,* to restrain the basic liberty of movement. The Convention on Human Rights of the United Nations has set forth the principles of liberty of movement which underlie this case:

> "(1) Everyone has the right to freedom of movement and residence within the borders of each state.
>
> (2) Everyone has the right to leave any country, including his own, and return to his country." [61]

V

The action was improperly dismissed as to the Attorney General.

The Court below was unanimous in dismissing the complaint against the Attorney General (R. 68-69). Judges Clarie and Blumenfeld did so upon the ground that the Secretary's restrictions were valid (R. 46, 67), Judge Smith on the ground that the relief sought was premature (R. 57). If the Secretary's restrictions are invalid for any of the reasons presented above, the court below was in error in dismissing the complaint in view of its allegations as to the Attorney General's conduct.

Thus, the complaint alleged that the Attorney General had power to regulate the departures from the United States (R. 1); the Government's denial (R. 7) is in conflict with the existing practice of border control by the Immigration and Naturalization Service of the Department of Justice.

The complaint alleged that the Attorney General had instituted a criminal prosecution of another person for entering the United States from Cuba without a passport

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[61] United Nations Department of Public Information, Universal Declaration of Human Rights (1949), Article 13, S. Doc. 123, 81st Cong., 1st Sess., 1156.

(R. 3); this was admitted by the Attorney General (R. 8). Thereafter, other American citizens were indicted either for travel to and from Cuba without a passport or without one specifically endorsed for such travel.[62]

The complaint also alleged that the restrictions and sanctions imposed by the two defendants had caused common carriers to refuse to carry United States citizens and had caused foreign governments to refuse to permit departure of American citizens for Cuba (R. 3). While there is a formal denial (R. 8), it is at least qualified by the Declaration of Costa Rica (R. 47-48) and by other agreements relied upon by the Government below.

The declaratory judgment procedure was intended to be a substitute, under circumstances such as these, for criminal prosecutions. See Borchard, *Declaratory Judgments*, 2nd ed. 1941, pp. 906, 1920-1921; S. Rep. 1005, 73rd Cong. 2d Sess., pp. 2-3, on the bill which later became the Declaratory Judgment Act. The report quotes with approval as underlying the purpose of the Act this Court's language in *Terrace* v. *Thompson*, 263 U. S. 197, 216:

> "They are not obligated to take the risk of prosecution, fines and imprisonment and loss of property in order to secure a judgment of their rights."

See also Borchard, *Challenging Penal Statutes by Declaratory Action*, 53 Yale L. J. 445, 461 (1943).

The prematurity argument of Circuit Judge Smith (R. 57) is made more doubtful by the increasing number of criminal prosecutions since that opinion was rendered.

As a practical matter, of course, a decision against the Secretary which would hold his attempted exercise of power unlawful would be obeyed by the Attorney General. Nevertheless, since this case is here for review, it is an appropriate occasion for the Court's determination of the issue for the benefit of future litigants.

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[62] See the cases cited in n. 23, *supra*.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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Dated, December 4, 1964.

APPENDIX

Statutes, Proclamations, Executive Orders and Regulations

1. The Act of July 3, 1926, c. 772, § 1, 44 Stat. 887, 22 U. S. C. 211a provides, in pertinent part, as follows:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

2. Section 215 of the Immigration & Nationality Act of 1952, Act of June 27, 1952, c. 477, Title II, c. 2, 66 Stat. 190, 8 U. S. C. 1185 provides, in pertinent part, as follows:

> TRAVEL CONTROL OF CITIZENS AND ALIENS DURING WAR OR NATIONAL EMERGENCY—RESTRICTIONS AND PROHIBITIONS ON ALIENS
>
> (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—
>
> (1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and

orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

CITIZENS

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or

enter, the United States unless he bears a valid passport.

PENALTIES

(c) Any person who shall wilfully violate any of the provisions of this section, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than $5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment or both: and any vehicle, vessel, or aircraft together with its appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States.

DEFINITIONS

(d) The term "'United States" as used in this section includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States. The term "person" as used in this section shall be deemed to mean any individual, partnership, association, company, or other incorporated body of individuals; or corporation, or body politic.

NONADMISSION OF CERTAIN ALIENS

(e) Nothing in this section shall be construed to entitle an alien to whom a permit to enter the United States has been issued to enter the United States, if, upon arrival in the United States, he is found to be inadmissible under any of the provisions of this chapter, or any other law, relative to the entry of aliens into the United States.

REVOCATION OF PROCLAMATION AS AFFECTING PENALTIES

(f) The revocation of any proclamation, rule, regulation, or order issued in pursuance of this section shall not prevent prosecution for any offense committed, or the imposition of any penalties or

forfeitures, liability for which was incurred under this section prior to the revocation of such proclamation, rule, regulation, or order.

PERMITS TO ENTER

(g) Passports, visas, reentry permits, and other documents required for entry under this chapter may be considered as permits to enter for the purposes of this section.

3. 5 U. S. C. § 156 R. S. § 202 provides as follows:

Management of foreign affairs. The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the department, and he shall conduct the business of the department in such manner as the President shall direct.

4. 22 U. S. C. 1732 R. S. § 2001 provides as follows:

Release of citizens imprisoned by foreign governments

Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as

practicable be communicated by the President to Congress.

5. The pertinent portions of Executive Order No. 7856 of 1938, March 31, 1938, 3 F. R. 799 as found in Part 51 of Title 22 of the Code of Federal Regulations, are as follows:

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

§51.76 *Violation of passport restrictions.* Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of the rules in this part, the protection of the United States may be withdrawn from him while he continues to reside abroad.

51.77 *Secretary of State authorized to make passport regulations.* The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

6. The pertinent portions of Presidential Proclamation No. 2914, Dec. 16, 1950, 64 Stat. A 454, are as follows:

A PROCLAMATION

WHEREAS recent events in Korea and elsewhere constitute a grave threat to the peace of the world and imperil the efforts of this country and those of the United Nations to prevent aggression and armed conflict; and

WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world; and

WHEREAS if the goal of communist imperialism were to be achieved, the people of this country would no longer enjoy the full and rich life they have with God's help built for themselves and their children; they would no longer enjoy the blessings of the freedom of worshipping as they severally choose, the freedom of reading and listening to what they choose, the right of free speech including the right to criticize their Government, the right to engage freely in collective bargaining, the right to engage freely in their own business enterprises, and the many other freedoms and rights which are a part of our way of life; and

WHEREAS the increasing menace of the forces of communist aggression requires that the national defense of the United States be strengthened as speedily as possible:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, do proclaim the existence of a national emergency * * *.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

Done at the City of Washington this 16th day of December, 10:20 a. m., in the year of our Lord nineteen hundred and fifty, and of the Independence of the United States of America the one hundred and seventy-fifth.

HARRY S. TRUMAN.

7. The pertinent portions of the Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. C 31, "Control of Persons Leaving or Entering the United States By the President of the United States," are as follows:

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United

States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of

title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

2. The departure of aliens from the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.61 to 53.71, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

3. The entry of aliens into the Canal Zone and American Samoa shall be subject to the regulations prescribed by the Secretary of State, with the concurrence of the Attorney General, and published as sections 53.21 to 53.41, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * *

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof

the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and this proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provision of that section or of this proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

* * *

8. The pertinent portions of the regulations issued by the Secretary of State as found in Part 53 of Title 22 of the Code of Federal Regulations are:

"Part 53—Travel Control of Citizens and Nationals in Time of War or National Emergency.

American Citizens and Nationals

§ 53.1 *Definition of the term "United States".* The term "United States" as used in this part includes the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

§ 53.2 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States as defined in § 53.1, unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3.

§ 53.3 *Exceptions to regulations in § 53.2.* No valid passport shall be required of a citizen of the United States or of a person who owes allegiance to the United States:

(a) When traveling between the continental United States and the Territory of Hawaii, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam, or between any such places; or

(b) When traveling between the United States and any country, territory or island adjacent thereto in North, Central, or South America, excluding Cuba: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or any island adjacent thereto: *And provided also,* That this section shall not be applicable to any seaman except as provided in paragraph (c) of this section; or

(c) When departing from or entering the United States in pursuit of the vocation of seaman: *Provided,* That the person is in possession of a specially validated United States merchant mariner's document issued by the United States Coast Guard; or

• • •

(h) When specifically authorized by the Secretary of State through appropriate official channels, to depart from or enter the United States, as defined in § 53.1. The fee for granting an exception under this subsection is $25.

• • •

§ 53.5 *Prevention of departure from or entry into the United States.* • • •

§ 53.6 *Attempt of a citizen or national to enter without a valid passport.* • • •

• • •

§ 53.8 *Discretional exercise of authority in passport matters.* Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.

9. Public Notice 179, 26 F. R. 492, promulgated on January 16, 1961 provides:

"DEPARTMENT OF STATE

[Public Notice 179]

United States Citizens
Restrictions on Travel to or in Cuba

In view of the conditions existing in Cuba and in the absence of diplomatic relations between that country and the United States of America I find that the unrestricted travel by United States citizens to or in Cuba would be contrary to the foreign policy of the United States and would be otherwise inimical to the national interest.

Therefore pursuant to the authority vested in me by Sections 124 and 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F. R. 681, 687, 22 CFR 51.75 and 51.77) under authority of Section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887, 22 U.S.C. 211a), all United States passports are hereby declared to be invalid for travel to or in Cuba except the passports of United States citizens now in Cuba. Upon departure of such citizens from Cuba their passports shall be subject to this order.

Hereafter United States passports shall not be valid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State or until this order is revoked.

Dated: January 16, 1961

For the Secretary of State.

LOY HENDERSON,
Deputy Under Secretary for
Administration."

10. Press Release No. 24 issued by the Secretary of State on January 16, 1961, provides:

PRESS RELEASE No. 24

The Department of State announced today that in view of the United States Government's inability, following the break in diplomatic relations between the United States and Cuba, to extend normal protective services to Americans visiting Cuba, United States citizens desiring to go to Cuba must until further notice obtain passports specifically endorsed by the Department of State for such travel. All outstanding passports, except those of United States citizens remaining in Cuba, are being declared invalid for travel to Cuba unless specifically endorsed for such travel.

The Department contemplates that exceptions to these regulations will be granted to persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests.

Permanent resident aliens cannot travel to Cuba unless special permission is obtained for this purpose through the United States Immigration and Naturalization Service.

Federal regulations are being amended to put these requirements into effect.

These actions have been taken in conformity with the Department's normal practice of limiting travel to those countries with which the United States does not maintain diplomatic relations.